United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2007

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM BREWINGTON Appellant, -against- UNITED STATES OF AMERICA, Appellee.	Docket No. 75 Cr.2007

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN

Of Counsel

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QUESTION PRESENTED

Whether appellant's guilty plea was knowing and voluntary, for it was made in ignorance of the sentence consequences of the plea.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Orrin G. Judd) dated July 30, 1974 denying without a hearing an application pursuant to 28 U.S.C. §2255.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant, along with a co-defendant, pleaded guilty* on June 25, 1973, to possession of cocaine with intent to distribute (21 U.S.C. §841(a)(1)).** On September 14, 1973, appellant was sentenced to imprisonmnet for a term of six years and to special parole for a term of ten years. No appeal was taken.

The sentence imposed in this case was to run concurrently with a ten year term of imprisonment and a six year term

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* The minutes of the proceedings are "B" to appellant's separate appendix.

** The indictment (73 Cr.303) annexed as "C" to appellant's separate appendix had also charged petitioner with conspiracy to distribute cocaine.

of special parole imposed on appellant on July 24, 1973, in the Southern District of New York following a conviction after a jury trial for possession of heroin.

On June 28, 1974, appellant filed the present petition to vacate his conviction, claiming that his guilty plea was invalid because Judge Judd, in violation of Rule 11 of the Federal Rules of Criminal Procedure, failed to advise him that, in addition to a term of imprisonment, he was to receive a special parole term. In rejecting appellant's claim, Judge Judd stated:

> Petitioner complains that he was not advised at the time of his guilty plea on June 25, 1973, that there might be a special parole term in addition to his sentence. Petitioner's assertion is not supported by any documentation. Since he had previously been found guilty of possession of heroin in a different case in the United States District Court for the Southern District of New York he must in any event have been aware of the potential penalty when he pleaded guilty here. His sentence in the Southern District, according to the record, was to ten-year concurrent terms plus a special parole term of six years, imposed on July 24, 1973, after a guilty verdict by a jury.
>
> There is no meritorious reason to vacate the sentence.
>
> Memorandum and Order
> July 26, 1974.

ARGUMENT

APPELLANT'S GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY, FOR IT WAS MADE IN IGNORANCE OF THE SENTENCE CONSEQUENCES OF THE PLEA.

Appellant pleaded guilty to one count of a two count indictment charging him with participation in a cocaine distribution scheme. At the proceedings at which the guilty plea was interposed Judge Judd addressed appellant, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, but failed to advise him that, in addition to a term of imprisonment, his guilty plea would result in a term of special parole. Appellant was later sentenced to six years' imprisonment and ten years' special parole, to run concurrently with another recently imposed sentence of ten years' imprisonment and six years' special parole.

In his opinion below denying appellant's motion to vacate the conviction, Judge Judd acknowledged the importance of appellant being aware of the special parole term as a consequence of the guilty plea,* but ruled that appellant must have been aware of the special parole condition becasue of his recent narcotics conviction in the

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* That a term of special parole is a sentence consequence of a guilty plea which must be explained to the defendant by the judge was conclusively decided by this Court in Michel v. United States, Doc. No. 74-2198 (2d Cir. December 2, 1974).

Southern District of New York:

> Petitioner complains that he was not advised at the time of his guilty plea on June 25, 1973 that there might be a special parole term in addition to his sentence. Petitioner's assertion is not supported by any documentation. Since he had previously been found guilty of possession of heroin in a different case in the United States District Court for the Southern District of New York, he must in any event have been aware of the potential penalty when he pleaded guilty here. His sentence in the Southern District, according to the record, was to ten-year concurrent terms plus a special parole term of six years, imposed on July 24, 1973 after a guilty verdict by a jury.
>
> There is no meritorious reason to vacate the sentence.
>
> Memorandum and Order, July 26, 1974.

Judge Judd's ruling that appellant "must" have been aware of the special parole term consequence of his guilty plea, due to the imposition of sentence on a recent narcotics conviction in the Southern District of New York, is clearly erroneous. The Southern District sentence occurred on July 24, 1973. Appellant pleaded guilty in the Eastern District on June 25, 1973. Thus, only <u>after</u> the plea was entered did appellant learn of the sentence consequences of his prior Southern District heroin conviction. Further, even after appellant was sentenced to special parole in the Southern Dis-

trict case, appellant had no reason to believe that imposition of special parole was mandatory in the Eastern District case. Appellant could well have believed that special parole was a discretionary sentence. Thus, there is nothing on this record to indicate that he was aware at any time of the sentence consequences of his guilty plea.

The necessity of the judge addressing the defendant directly on all matters relating to the plea in order to protect the rights of even the least sophisticated defendant, rather than the judge relying on possible knowledge obtained from other sources such as the prosecutor, defense counsel, prior proceedings, and self-obtained knowledge, was recognized by the Supreme Court in McCarthy v. United States, 394 U.S. 459, 471-72 (1969):

> We . . . conclude that prejudice inheres in a failure to comply with Rule 11, for concompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea . . . It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

See also Irizarry v. United States, Doc. No. 74-1866 (2d Cir., December 19, 1974).

Following McCarthy v. United States, supra, this Court has repeatedly ruled that noncompliance with Rule 11 requires automatic vacation of the plea in question. See, for example, Jones v. United States, 440 F.2d 466, 468 (2d Cir. 1971) (failure to advise of possible maximum sentence); United States v. Welton, 439 F.2d 824, 826 (2d Cir. 1971) (failure to inform of ineligibility for parole); Bye v. United States, 435 F. 2d 177, 182 (2d Cir. 1970) (failure to advise of ineligibility for probation or parole). Thus, Judge Judd's failure to advise appellant of the special parole term consequences of appellant's guilty plea rendered that plea "beyond cure" (George v. United States, 421 F.2d 128, 130 (2d Cir. 1970)), requiring that the conviction be vacated.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE DISTRICT COURT ORDERED TO GRANT THE PETITION.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN

Of Counsel

Certificate of Service

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

William Epstein